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C O N F I D E N T I A L SECTION 01 OF 03 THE HAGUE 001033

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E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY
TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)
SUBJECT: ICTY: KRSTIC JUDGMENT SETS ASIDE GENOCIDE
CONVICTION, LEAVING BEHIND A FRUSTRATED AND BITTER
PROSECUTION

Classified By: Legal Counselor Clifton M. Johnson per 1.5(d).

1. (SBU) Summary: The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) set aside a trial chamber's 2001 judgment that Radislav Krstic, commander of the Drina Corp immediately under Ratko Mladic during the Srebrenica massacres of July 1995, perpetrated genocide. The Appeals Chamber found that significant portions of the evidence showed that Krstic knew of other officers' genocidal intent and made contributions toward their murderous endeavor, but that it did not show that he shared the "intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such," as required by international law. The immediate reaction of the prosecution team has been one of frustration and anger toward what it sees as an over-reaching and poorly reasoned decision. End summary.

2. (U) In a Judgment issued on April 19 and summarized in open court by ICTY President and Presiding Judge Theodor Meron, the Appeals Chamber found that, while "the Bosnian Serb forces committed genocide" in and around Srebrenica in July 1995, General Radislav Krstic himself was not a principal perpetrator. Rather, Krstic aided and abetted the commission of genocide, principally by making substantial resources of the Republika Srpska Army's (VRS) Drina Corp, which he commanded, available to Serb forces carrying out the massacres and the subsequent reburials. The Appeals Chamber thereby set aside Krstic's conviction for genocide, for which the Trial Chamber had sentenced him to forty-six years in prison, and convicted him instead as an aider and abettor of genocide, an aider and abettor of extermination and persecution as crimes against humanity and murder as war crimes, and as a participant in murder and persecutions as war crimes. The Appeals Chamber, taking into account the reduced responsibility for genocide and other "mitigating" factors, reduced his sentence to thirty-five years.

3. (SBU) Prosecutors, both senior and junior, expressed varying degrees of disappointment at the Appeals Chamber decision. They have focused their displeasure on two levels -- first, the chamber's readiness to find fault with numerous factual findings of the trial chamber, seemingly without paying any deference to the trial chamber's fact-finding; and second, what they perceive as legal gymnastics which allowed it to find that 'genocide occurred' without identifying any particular or specific perpetrators.

4. (C) On evidentiary questions, one senior prosecutor condemned the Appeals Chamber judgment as displaying "arrogance" and failing to appreciate the entire range of facts and contexts which supported the trial chamber judgment. Prosecutors are chafing at numerous instances where the Appeals Chamber found that the Trial Chamber's interpretation of evidence was unreasonable. These included, for instance, an assessment of what Krstic would have understood from Mladic when the latter said, in company that included a Bosniak, UNPROFOR personnel and the accused, that the Bosnian Muslims in Srebrenica could "survive, stay, or disappear" (among other similar threats). In another instance, the Appeals Chamber disputed the Trial Chamber's interpretation of a coded statement in which PIFWC Beara sought Krstic's assistance in the 'distribution' of 3500 'parcels' -- which to the Trial Chamber, and to a dissenting appeals judge, clearly meant 'killing of 3500 persons'. On a more general level, the prosecutors are upset that conclusions seen as supported by hundreds of hours of trial, thousands of pages of transcripts/evidence, and hundreds of paragraphs of the Trial Chamber's judgment could be dismissed as unreasonable by judges who did not sit through the long proceedings themselves. (NB: The Trial Chamber included the well-regarded U.S. Judge Patricia Wald, formerly of the federal Appeals Court for the District of Columbia.)

5. (C) Reactions to the Appeals Chamber's legal conclusions have been more complicated. There is a general sense among prosecutors that the Appeals Chamber first decided that Krstic did not merit conviction as a principal perpetrator of genocide but that, for "political" reasons, it did not want

to set aside the finding that the massacres around Srebrenica constituted genocide. The result, one prosecutor said, made it seem as if "an eighteen year-old law clerk" had written the judgment on the basis of a decision reached "by academics and diplomats". In fact, a law clerk involved in the drafting confirmed to embassy legal officers that the chamber had given the drafters general directions, "the bottom line," and that the law clerk drafters had to determine how to get there. (NB: In some respects, such an approach does not differ significantly from U.S. appeals courts, where law clerks tend to do the lion's share of drafting and research.)

In any event, many are perplexed that the Appeals Chamber could "call() the massacre at Srebrenica by its proper name: genocide", but fail to identify perpetrators who in fact shared the specific intent to commit genocide, as required by the ICTY Statute and the 1948 Genocide Convention. The references to Mladic's bellicose, seemingly genocidal statements, moreover, are downgraded as evidence reflecting even his intent to commit genocide, making the conclusion all the more troubling to prosecutors who need to consider how the judgment affects further genocide prosecutions.

16. (C) Meanwhile, the Appeals Chamber seems to have made it easier to prosecute a person for aiding and abetting genocide, leading to one prosecutor's conclusion that the law now reflects a strict liability standard for aiding and abetting genocide (i.e., knowledge plus support, without intent to commit genocide, amounts to aiding and abetting genocide). It has also been described as a law criminalizing the "failure to prevent" genocide.

17. (C) A dissenting opinion by Judge Shahabuddeen (a consistent dissenter or separate-opinion writer) gives voice to the prosecution's concerns, particularly with respect to the lack of deference to Trial Chamber fact-finding. To Shahabuddeen's mind, the Trial Chamber's extensive documentation of the evidence in its Judgment strongly supported the conviction of Krstic for genocide. His dissent presents similar evidence to that assessed by the majority but reaches starkly different conclusions, such as that Krstic evidently did share the intent to commit genocide during the crucial days of mid-July 1995. The dissent in effect undermines the Appeals Chamber's repeated statements that the Trial Chamber reached decisions that were not ones "that a reasonable trier of fact could have made."

18. (SBU) Apart from the questions associated with genocide, the Appeals Chamber also addressed whether Krstic could be convicted of "cumulative" charges (i.e., convicting him on several grounds for the same basic criminal offense) and whether the Prosecution violated any of its obligations to disclose to the defense exculpatory material in accordance with Rule 68 of the Tribunal Rules of Procedure and Evidence.

The Appeals Chamber confirmed that the defense could only be granted a remedy in the event that the Prosecution failed to comply with Rule 68 and that failure resulted in prejudice to the defense. The Appeals Chamber found that Rule 68 violations by the Prosecution did not materially prejudice to the defense, thereby not requiring a retrial or similarly stark remedies as requested by the defense. It did, however, order the Prosecution to "investigate the complaints alleged and take appropriate action."

19. (C) Comment: What is striking about the comments of prosecutors is not their disappointment in the Krstic appeals decision; any prosecutor is disappointed when their "victory" is pared back on appeal. Rather, it is the anger and bitterness, borne out of their surprise at the judgment, which undercuts what was a landmark ruling on Srebrenica and genocide by a highly respected trial chamber. Embassy legal officers, from discussions with a key drafter of the opinion, share the sense that the Appeals Chamber took a results oriented approach in its decision. It wanted to establish that genocide occurred in Srebrenica, wanted to keep the bar very high for a genocide conviction, but also believed Krstic had some degree of responsibility. The result is are the legal gymnastics and intrusive reanalysis of the facts complained of by the prosecutors. In particular, the finding that the Chamber's conclusions were "unreasonable" in light of the evidence strikes us as a reach.

10. (C) Comment, cont'd: Whatever the motivations behind the result, the Judgment gives prosecutors in other cases involving genocide charges arising out of the Srebrenica massacres (i.e., Milosevic, Karadzic, Mladic, Krajisnik, Blagojevic, Drago Nikolic, Beara) a lot to study. One comes away from reading the Judgment tending to agree with the prosecutors who believe that it will make it easier to convict the mid- and lower-level indictees of aiding and abetting genocide but harder to convict the most senior leaders with direct perpetration of genocide. The possibility of a set of convictions for aiding and abetting genocide, but none for direct acts of genocide, surely puts pressure on the trial chambers to convict someone of principal responsibility for genocide, since the Appeals Chamber has affirmed that genocide did in fact occur. The

prosecutors believe that honor has been saved for Mladic, but few if any beneath him. End comment.
SOBEL